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CHARLES ELMORE

No. 217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

GUARANTY TRUST COMPANY, EXECUTOR,
Appellant,

vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER,
Appellee,

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

BRIEF IN BEHALF OF APPELLEE.

ERNEST L. AVERILL,
Deputy Attorney General,

FARWELL KNAPP,
Assistant Tax Commissioner.
Attorneys for Appellee.

THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

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vs.

WILLIAM H. BLODGETT, TAX COMMISSIONER,
Appellee,

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

STATEMENT OF FACTS.

Harriet D. Sewell died May 20, 1930, domiciled in Greenwich, Connecticut (R. 3). On December 28, 1926, she transferred to Guaranty Trust Company of New York (appellant herein) certain stocks and bonds, worth several hundred thousand dollars, by irrevocable trust deed, wherein she reserved to herself the net income for her own life; thereafter the net income was to be paid to her husband for his life, with remainder in fee to her daughter if she survived, but if not, to the issue of the daughter, with a gift over in default of

such issue. Extensive powers of purchase, sale, and management of the corpus of the trust fund were given to the trustees by paragraphs four and eleven of the trust deed, but these powers were all to be exercised under the direction and control of settlor's husband as long as he lived, and thereafter under the direction and control of settlor herself, as long as she lived (R. 5-10). Settlor's husband and daughter survived her (R. 3).

The Tax Commissioner of the State of Connecticut (appellee herein) conceded that this transfer was not made in contemplation of death (R. 3), but claimed that it was subject to the Connecticut succession tax, under the statute in force at the time of the execution of the trust deed, as a gift intended to take effect in possession or enjoyment at or after the death of the donor.

The Connecticut succession tax law in force at the time of the execution of the trust deed was Chapter 190, Public Acts 1923, Section 1, which reads as follows:

> "Section 1. All property and any interest therein owned by a resident of this state at the time of his decease . . . which shall pass by will or inheritance under the laws of this state; and all gifts of such property by deed, grant or other conveyance, made in contemplation of the death of the grantor or donor, or intended to take effect in possession or enjoyment at or after the death of such grantor or donor, shall be subject to the tax herein prescribed . . . "

A report concerning the transfer was duly filed on behalf of the present appellant in the Probate Court

for the District of Greenwich (R. 4), and the Tax Commissioner duly filed his computation of tax, claiming that the transfer was taxable (R. 4). The Probate Court made a decree finding the transfer non-taxable (R. 4). From this decree, the Tax Commissioner appealed to the Superior Court for Fairfield County, which, at the request of the parties, reserved the case for the advice of the Supreme Court of Errors (R. 22).

An agreed stipulation of facts (R. 3) was entered into in connection with this reservation, and it was stipulated that among the questions of law (R. 21) involved in the appeal were (1) whether the transfer was one which was by deed, grant or gift intended to take effect in possession or enjoyment at or after the death of the grantor or donor, within the meaning of the Connecticut statute in force at the date of execution of the trust deed, and (2) if the transfer were held so taxable, would the imposition of such tax offend against Amendment XIV of the Constitution of the United States or against any other provision of said Constitution.

The Supreme Court of Errors, in an opinion (R. 23) dated January 27, 1932, and reported in 114 Conn. 207, 158 Atl. 245, answered question (1) in the affirmative and question (2) in the negative.

A final judgment (R. 37) was entered in the Superior Court for Fairfield County in accordance with the holding of the Supreme Court of Errors; and from this final judgment the appellant herein has taken an appeal to this Court.

SUMMARY OF ARGUMENT.

This case involves the question of the power of the State of Connecticut to impose a succession tax upon a transfer of property by irrevocable trust deed reserving the life use to settlor, with remainders over after her death, as a gift "intended to take effect in possession or enjoyment at or after the death" of the donor, when such transfer was made by a resident and executed after the passage of a statute purporting to impose such a tax. The power of the state of domicile to impose a tax upon the succession to possession and enjoyment of property so transferred by a citizen is an incident of its sovereignty, and that power cannot be denied, unless somewhere within the Constitution of the United States is found a prohibition of its exercise.

Such power has uniformly been upheld by state courts, and it has been recognized by this Court in *Nickel v. Cole,* 256 U. S. 222 (1921) and *Keeney v. New York,* 222 U. S. 525 (1912), augmented by dicta in other cases. The text writers support the rule. Nor has the contrary been decided by this Court with reference to the Federal Estate Tax. The power of Congress prospectively to levy an estate tax upon such a transfer has never been denied. We submit, therefore, that the tax in the present case was within the power of the state to levy. Indeed, the law on this matter seemed to be well settled until the decision by this Court of certain cases, namely, *May v. Heiner,* 281 U. S. 238 (1930); *Commissioner v. Northern Trust Company,* 283 U. S. 782 (1931); *Morsman v. Commissioner,* 283 U. S. 783 (1931); and *McCormick v. Commissioner,* 283 U. S. 784 (1931). These cases, however, dealt with

the Federal Estate Tax and not with state succession taxes, and we believe that appellant has given a wrong construction to these decisions. They went off upon the question of Congress' intention. In the present case, the intention of the Connecticut legislature is not disputed; appellant admits (on page 3 of its Answer to Appellee's Motion to Affirm) that the Connecticut statute was intended to cover such a transfer; so that the cases just cited are inapplicable even by way of analogy, and even if this Court did not feel itself bound to adopt the lower court's holding as to the construction and meaning of the state statute (page 3, Appellee's Motion to Affirm, and cases cited therein). Further, even if this were not so, there is such a distinction between an estate and an inheritance tax that decisions as to the former are not necessarily controlling as to the latter. Finally, no showing can be made that the imposition of the tax in the present case offended against the due process clause, the contract clause, or the equal protection clause of the United States Constitution and the Amendments thereto.

We shall accordingly discuss first, the matter of "gifts intended to take effect in possession or enjoyment at or after death" in general terms; second, discuss authorities dealing with state succession taxes up to the decision of *May v. Heiner,* supra; third, cases in this Court dealing with an estate tax upon this sort of transfer, and, under this head, the question of intention and the question of the distinction between an estate and an inheritance tax; fourth, notice some recent state court decisions; and fifth, discuss appellant's specific claims of unconstitutionality.

I.

GENERAL DISCUSSION OF GIFTS INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER DEATH

The above phrase will, hereafter, for the sake of convenience be shortened to "gift intended". Succession taxes have long been used by the various states of this country, the first state law having been passed in 1826, in Pennsylvania; Act of April 7, 1826, Section 1. That statute contained the phrase "gift intended", which was copied by practically all the states in their laws. In Connecticut, the phrase was inserted in the first succession tax statute in 1889 (Section 1, Chapter 180, Connecticut Public Acts 1889) and continued until 1897. It was restored in 1915 (Section 3, Chapter 332, Connecticut Public Acts 1915), and has since continued unchanged in any material respect up to the present time. It is now to be found in Connecticut General Statutes, 1930 Revision, Sections 1360, 1361.

The reason for the inclusion of the phrase "gift intended", along with its companion phrase "gift in contemplation of death" is obvious; otherwise the succession tax would be so easy to avoid as to be wholly nugatory. Accordingly these two phrases have long been treated as proper complements of the succession tax imposed upon devolution by will or by intestacy. Of the phrase "gift in contemplation of death" it has recently been said by this Court:

> "It is sufficient for present purposes that such gifts are motivated by the same considerations as lead to testamentary dispositions of property,

> and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present (United States) statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of death taxes by gifts made before, but in contemplation of, death. It is thus an enactment in aid of, and an integral part of, the legislative scheme of taxation of transfers at death . . . We hold, as this Court has several times intimated, that the inclusion of this type of gifts in a single class with decedents' estates to ensure equality of taxation, and prevent evasion of estate taxes, is a permissible classification of an appropriate subject of taxation." *Milliken v. United States,* 283 U. S. 15, 20, 23 (1931).

These words are applicable with equal force to the phrase "gift intended". Of that phrase, it was said by the New York Court of Appeals, in *Matter of Keeney,* 194 N. Y. 281, at page 286 (affirmed 222 U. S. 525 (1912), *sub. nom. Keeney v. New York*)

> "A not wholly unnatural desire exists among owners of property to avoid the imposition of inheritance taxes upon the estates they may leave, so that such estates may pass to the objects of their bounty unimpaired. It is a matter of common knowledge that for this purpose trusts or other conveyances are made whereby the grantor reserves to himself the beneficial enjoyment of his estate during life. Were it not for the provision of the statute which is challenged, it is clear that in many cases the estate on the death of the grantor would pass free from tax to the same persons who would take it had the grantor made a will or died intestate. It is

> true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate. We think this fact justified the legislature in singling out this class of transfers as subject to a special tax."

This was said in 1909; it applies with even more force today, since with the recent great development in the use of living trusts—many of which are cast in this form because settlors wish to enjoy the income of their property during their lives and direct how the principal shall go after their deaths—the question of taxation assumes great practical importance.

II.

CASES DEALING WITH STATE SUCCESSION TAXES UPON "GIFTS INTENDED".

An immense amount of litigation has occurred upon this question, but no useful purpose would be served in citing all the cases. It is sufficient to say that all the cases in the state courts, which we have discovered, seem to be unanimously in accord with the decision of the court below in the case at bar. This is true from the first case, *Reish, Admr. v. Commonwealth,* 106 Pa. St. 521 (1884) down to the present. The general subject is exhaustively covered in an article by Professor Rottschaefer of the University of Minnesota in the Minnesota Law Review for April and May 1930 (Vol. 14, pages 453, 613). See also *Gleason & Otis on Inheritance Taxation* (4th Edition) pages 380 et seq. The more recent cases are collected in A. L. R. annotations, Vol. 49, p. 864 et seq, especially pp. 874-878, and Vol. 67, p. 1247-1253.

Gleason & Otis, supra, cite two decisions by this court as affirming the unanimous position of the state courts; namely, *Nickel v. Cole, supra,* 256 U. S. 222 (1921), and *Keeney v. New York, supra,* 222 U. S. 525 (1912). A closer analysis of these cases leads us to believe that they are not squarely in our favor, although very close to it; so that it cannot accurately be said that the exact point has already been decided by this Court. We proceed to analyse these two cases.

Nickel v. Cole, 256 U. S. 222 (1921). In this case settlor created an irrevocable trust, reserving the life

use to himself, with remainders over after his death. This was executed after the passage, but before the operative date, of a Nevada statute levying an inheritance tax upon gifts intended to take effect in possession or enjoyment at or after death. The state court upheld the tax, which was affirmed by this Court, Mr. Justice McKenna dissenting without opinion.

This is not, however, a square decision in our favor, for Mr. Justice Holmes, writing for the majority of this Court says (p. 224) that the taxpayer conceded that if the statute had been in operation before the execution of the trust deed, the tax would have been due, so this Court refrains from discussing this phase of the case. On the other hand, he adds (p. 225), the court below seems to have conceded that if the deed had been executed before the passage of the statute, no tax would be due. The court below arrived at its result by holding that the execution of the trust deed, and the execution of decedent's will (which occurred on the same day, and made similar dispositions) was one transaction, and gave no vested right until decedent's death. This Court refused to upset this, saying that the decision below was upon grounds which had no relation to any federal question, and adding (p. 226):

> "And when, as here, the statute unquestionably might have made the tax applicable to this transfer, we do not inquire very curiously into the reasoning by which the statute is held to justify the tax. 'As there was power to tax . . . the question whether or not the interest (of the plaintiff in error) under the circumstances was correctly subjected to the tax was a purely state question'. *Moffit v. Kelly,* 218 U. S. 400."

We submit that these words are applicable to the case at bar.

In *Keeney v. New York, supra,* 222 U. S. 525 (1912) it appears that the trust, wherein the settlor reserved the life use, was revocable. Neither the New York Court of Appeals nor this Court mentions that fact in their opinions, which are, therefore, apparently broad enough to cover the case of an irrevocable trust reserving the life use to settlor. But since the effect, if any, of revocability was neither argued nor noticed, we cannot rely on the case as a square authority in our favor. The argument was directed to, and the opinion dealt with other matters, namely, the broad questions of whether a state inheritance tax levied upon gifts intended to take effect in possession or enjoyment at or after death violates the due process clause or the equal protection clause. The case is, therefore, important for our purposes, since these same questions are raised by appellant in the case at bar and are, we believe, effectively disposed of by the opinion in *Keeney v. New York.* These points will be noticed more in detail later.

This was the state of the authorities up to the time of the decision of *May v. Heiner, supra,* in 1930. It is supposed, by the appellant and others, that that decision indicates the beginning of a new trend which, if logically followed out, will result in a ruling by this Court that a state has no power even prospectively to tax such a transfer as the one we are here concerned with. This result seems highly unlikely to us, since it would amount to a reversal not only of all the state authorities, but of *Nickel v. Cole, supra,* if not also of *Keeney v. New York, supra.* It springs, we believe,

from a misunderstanding of the effect of *May v. Heiner, supra,* together with *Commissioner v. Northern Trust Company, supra, Morsman v. Commissioner, supra,* and *McCormick v. Commissioner, supra.* In order to get at the root of this misunderstanding, it is necessary for us to analyze a line of cases in this Court leading up to the above-mentioned decisions.

III.

ANALYSIS OF CASES IN THIS COURT DEALING WITH ESTATE TAXES UPON IRREVOCABLE TRANSFERS IN TRUST.

We now turn to a consideration of a series of cases in this Court dealing with the liability to Federal Estate Tax of irrevocable transfers in trust wherein the settlor created life uses, with remainders over after his death. The Federal Estate Tax Law, since its beginning in 1916, has contained the phrase "gift intended to take effect in possession or enjoyment at or after the death of the donor". Every succeeding amendment has continued that phrase, and it is now to be found in C. 454, 46 Stat. 1516. This tax is usually held to be upon the interest which ceases by reason of the death of the decedent, rather than upon the interest to which some person succeeds because of a death. This distinction has, or may have, important theoretical bearings, as we shall attempt to show.

We shall confine ourselves to cases involving irrevocable trusts, since it is both obvious and well settled that if such a trust is revocable by the settlor it is subject to Federal estate tax *(Reinecke v. Northern Trust Co.,* 278 U. S. 339; *Chase National Bank v. United States,* 278 U. S., 327) and *a fortiori* is subject to succession tax *(Saltonstall v. Saltonstall,* 276 U. S. 260; *Blodgett v. Union & New Haven Trust Co.,* 97 Conn. 405, 116 Atl. 908).

Turning then to the cases in this Court dealing with such irrevocable trusts, we find that they are as follows:

(a) *Shwab v. Doyle,* 258 U. S. 529 (1922). It was held that an irrevocable trust created prior to the passage of the Federal estate tax, wherein the settlor created a life estate in the trust property, not for herself but for the benefit of some other person for his life, with remainders over to such life tenant's children, was not includible in the gross estate subject to Federal estate tax. In the first place, settlor retained no economic benefits whatever. But even if she had, the case holds that the Federal estate tax law of 1916 was not retroactive, and did not apply to a transfer made prior to its passage. This is exactly the same rule adopted by the court below, with reference to the Connecticut succession tax, in *Blodgett v. Union & New Haven Trust Co.,* 97 Conn. 405, 116 Atl. 908, *supra,* and by most other state courts.

(b) *Shukert v. Allen,* 273 U. S. 546 (1927). Here the settlor created a trust in 1921, retaining no interest in or control over it whatever, but providing that the income should be accumulated for 30 years (until 1951), unless the last of his three children should have died more than 21 years before that date, etc., and then to divide the principal and accumulated income among his three children by name. Settlor was 56 years old at the time, and the transfer was concededly not made in contemplation of death. It was held not subject to Federal estate tax. There was obviously no shifting of economic interests from the settlor to anybody else at his death; indeed the transfer was made with no

reference whatever to his death. Mr. Justice Holmes, writing for the court, said:

> " . . . But it seems to us tolerably plain, that when the grantor parts with all his interest in the property to other persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death."

(c) *Nichols v. Coolidge,* 274 U. S. 531 (1927). Here husband and wife created an irrevocable trust in 1907 (prior to the passage of the Federal estate tax), reserving the life use to themselves, with remainders over after the death of the survivor of their five children, plus certain contingent remainders not here material. In 1917 the two settlors gave up and assigned to their children their entire interest in the property, especially any right to the income. The wife survived her husband and died in 1921. It was held that her estate was not subject to Federal estate tax with respect to the trust property. This case arose under the Federal Revenue Act of 1918, which was identical (in this regard) with the 1916 act under which *Shwab v. Doyle, supra,* was decided, except that the 1918 act contained the following parenthesis, which was not present in the 1916 act, viz: "(whether such transfer or trust is made or created before or after the passage of this Act)". In other words, *Nichols v. Coolidge* and *Shwab v. Doyle* are companion cases, the result of the two decisions being that if the irrevocable trust reserving life use to the settlor is made prior to the passage of the taxing law, it is not subject to Federal estate tax, no

matter whether the law purports to include it as taxable or not. This is substantially the same theory adopted with respect to a succession tax in *Blodgett v. Union & New Haven Trust Company, supra,* 97 Conn. 405, 116 Atl. 908. There is, also, another ground for the decision in *Nichols v. Coolidge,* quite apart from the fact that the trust was irrevocably created in 1907. This second ground is that in 1917 both settlors gave up any right to a life use. Thereafter they had none, so that there was no shifting of economic benefits at the death of the surviving spouse, since the children (originally remaindermen) from 1917 on enjoyed and possessed the income—the most important economic incident of the property. It is uncertain from the language of the court whether it relied on this second ground as well as the first, but presumably it did so.

(d) In *Reinecke v. Northern Trust Co.,* 278 U. S. 339 (1929), there were two sets of trusts. The first set of two trusts, reserving a life use to settlor, though created long before the passage of the Federal estate tax act of 1916, were nevertheless revocable by the settlor alone, and were accordingly held subject to the Federal estate tax in force in 1922, when the settlor died. This is clear, but is aside from the point we are now considering. Our concern is with the second set of five trusts created in 1919, while the Revenue Act of 1918 was in force. In these five trusts, settlor did not reserve any life use to himself, but in each case the income was made payable to a named beneficiary (presumably some relative of the settlor). Each trust was to terminate five years after the settlor's death or on the death of the respective life tenants, whichever

should first occur, with remainders over to others. The settlor reserved the right to revoke each of these five trusts with the consent of the respective life tenant. It will be noticed that the settlor retained no interest whatever in these trusts, either as to principal or income, except insofar as the qualified power to revoke was an interest. The court held that it was not, since the settlor's power to revoke was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, and that the trusts, for all practical purposes, had passed as completely from any control by the settlor which might inure to his own benefit as if the gifts had been absolute. That being so, it followed, from the rule of *Shukert v. Allen, supra,* that the trusts were not subject to Federal estate tax.

(e) *May v. Heiner,* 281 U. S. 238 (1930). In 1917 the settlor created an irrevocable trust, the income to be paid to her husband during his lifetime; at his death, if settlor survived him, the income to be paid to her for the rest of her life, and on her death, or on her husband's death if he survived her, the trust was to cease and the principal to be paid to settlor's children. Settlor died in 1920. It did not appear whether she survived her husband. It will be observed that the settlor did not retain for herself any present income, nor any power of control or disposition, nor any interest whatsoever in the trust property, with the single exception of a possible reversionary interest in the income in the event that her husband should predecease her.

This Court held that her estate was not subject to Federal Estate Tax with respect to this trust. The opin-

ion is short and relies almost wholly upon *Reinecke v. Northern Trust Co., supra.* The decision of *May v. Heiner* has caused a large amount of discussion and litigation, including the case at bar. Mr. Justice McReynolds, writing for the unanimous court, said (281 U. S. 243):

> "The record fails clearly to disclose whether or not Mrs. May survived her husband. Apparently she did not. But this is not of special importance since the refund should have been allowed in either event . . . At the death of Mrs. May no interest in the property under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

It is these words which have caused the discussion and litigation. Many fiduciaries interpreted the words as holding that an irrevocable trust, reserving the life use to settlor, was beyond the power of Congress to subject to an estate tax. Accordingly, the following cases were brought to this Court:

(f) *Morsman v. Commissioner, supra,* 283 U. S. 783, wherein settlor in 1922 created an irrevocable trust, reserving life use to himself, with remainders over.

(g) *Commissioner v. Northern Trust Co., supra,* 283 U. S. 782, with similar facts, except that the trust was created in 1917.

(h) *McCormick v. Commissioner, supra,* 283 U. S. 784, wherein the settlor, in 1918, created a trust providing that so long as she should live, the income should be accumulated and added to principal, except that if in any year her net income should be less than $250,000, she could take from the trust income enough to bring her total net income up to $250,000, and that the trustee should pay out of the net income any amounts to charities which she might designate. In no year did her income fall below $250,000, and practically all of the trust income each year was paid to various charities designated by her. The trust further created remainders over after her death, and provided that the trust could be terminated by settlor and any one of her three children (the remaindermen), and further that if settlor survived her children, the whole trust property should revert to her. She did not, however, survive her children.

These cases were argued before this Court on Friday, February 27, 1931. Three days later, on Monday, March 2, 1931, decisions were handed down in all of them. The opinions were per curiam, and were identical, except for reversal or affirmance of the lower court, depending on how the lower court decided. They read as follows:

> "Per curiam: The question in this case is that of the construction of Sec. 402 (c) of the Revenue Act of 1921, C. 136, 42 Stat. 277, 278, a provision similar to that of Sec. 402 (c) of the Revenue Act of 1918, C. 18, 40 Stat. 1057, 1097, which has already been construed by this Court, and, in this view, there being no question of the constitutional authority of the Congress to im-

> pose prospectively a tax with respect to transfers or trusts of the sort here involved, the judgment of the United States Circuit Court of Appeals for the (Seventh) Circuit is (reversed) upon the authority of *May v. Heiner*, 281 U. S. 238."

On the very next day, Tuesday, March 3, 1931 (being the last session day of Congress), a House Joint Resolution was hurriedly passed (C. 454, 46 Stat. 1516) and was approved by the President on the same day. It amended the first sentence of Sec. 402 (c) of the Revenue Act of 1926 to read as follows, the italicized words being new:

> "(c) to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property, or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom.*"

An interesting picture is thus presented. It seems to us that this Court, knowing that the session of Congress was about to end, and realizing the vast amounts of money which might be involved in future similar cases, hastened to render decisions which might allow Congress to amend the law, at least with regard to future transactions. In view of the words of the per curiam opinions, which expressly state that there is no question of the constitutional authority of Congress to tax such transfers prospectively and in view

of the further fact that in the briefs and arguments of these three cases the question of the *power* of Congress to levy such a tax was vigorously argued, it seems to us to follow that this Court held that as to past transactions Congress had not *intended* to tax such transfers by the phrase which existed in all the Federal estate tax laws from 1916 down to 1931, "intended to take effect in possession or enjoyment at or after death". Congress immediately responded by declaring its intention in no uncertain terms, at least as to future transactions.

This conclusion is fortified, at least as to *May v. Heiner*, by the words of this Court in the case of *Milliken v. United States*, 283 U. S. 15 (decided March 2, 1931, the same day as *Commissioner v. Northern Trust Co., supra*, and the two companion cases). It was said (283 U. S. 19):

> "Petitioners' argument that Sec. 402 does not apply is not supported by their citations of *Reinecke v. Northern Trust Co.*, 278 U. S. 339, and *May v. Heiner*, 281 U. S. 238. In those cases the gifts inter vivos were not 'in contemplation of death", and the only relevant question was one of construction, whether some of them were of the class intended by Congress to be taxable under sec. 402 (c) as transfers 'intended to take effect in possession or enjoyment at or after his death'. It was held that they were not."

In this connection, the following statement by Congressman Hawley, Chairman of the Ways and Means Committee of the House (Congressional Record, March 3, 1931, page 7017) is presented:

"MR. HAWLEY: Yesterday afternoon the Supreme Court of the United States handed down decisions in three cases—in which the Court held that where an owner of property had made a transfer in trust reserving the income of the property, or the right to dispose of the income therefrom, to himself for his life, with remainder to others after his death, the value of the property should not be included in the estate of the donor for the purposes of Federal estate tax upon his death.

"Section 402 (c) of the Revenue act of 1926 provides as follows: (reads it)

"It had generally been considered that this provision of the statute covered cases such as those referred to above. The Treasury Department had so construed the statute since the first Federal estate tax law in 1916, and its regulations so provide. If, for example, the owner of property transferred the title to his house to a trustee for the benefit of his children after his death, but in the meantime reserved the use, income and enjoment of the house to himself during his own lifetime, it was supposed that the value of the property at the date of his death should be included in his estate for purposes of estate tax. Under the decisions rendered yesterday the property would not be included in computing the Federal estate tax.

"It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property.

> "It is of the greatest importance, therefore, that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed."

These recent decisions of this Court (also including, by express reference, *May v. Heiner)* are therefore only on the intention of Congress, not on its constitutional authority, which has never yet been decided. It will require further litigation, based on irrevocable trusts created after the 1931 amendment, to show whether or not Congress, if clearly intending to levy a tax, can constitutionally do so. Certainly, in view of the above, *May v. Heiner* and the later cases can in no way be said to be any authority whatever for the proposition that the sovereign (whether Congress or legislature) cannot constitutionally levy a death tax with respect to irrevocable transfer in trust reserving a life use to the settlor. The most that these cases decide is (to repeat) that Congress did not intend to levy a tax by the phrase it used.

But whatever this Court's opinion may be as to the intention of Congress in the Federal Estate Tax, it is not important in the case at bar because there is here no issue as to the intention of the Connecticut legislature in the Connecticut succession tax. In the first place, the appellant agrees with us that the Connecticut legislature intended to tax this transfer by the words it used (see p. 3 of Appellant's Answer to Appellee's Motion to Affirm). In the second place, even if appellant disagreed with us on this point, this Court will adopt the construction, made by the court below, of

the meaning and intent of the state statute (see p. 3 of Appellee's Brief in Support of Motion to Affirm, and cases there cited). And in the third place, even if both previous reasons were invalid, we submit that decisions on the Federal Estate Tax have no necessary bearing upon succession taxes, so far as this sort of transfer is concerned.

A.

ANALYSIS OF THE DISTINCTION BETWEEN AN ESTATE TAX AND AN INHERITANCE OR SUCCESSION TAX.

We propose to show, under this head, that although an Estate Tax and an Inheritance (or Succession) tax are both death taxes and are parallel in many ways, yet there is a basic difference between them, so deep that decisions upon the validity or scope of one sort of tax have no necessary bearing or authority upon the other sort. This distinction, in brief, is that an Estate Tax is levied upon the *transfer from* a decedent, while an Inheritance (or Succession) Tax is levied upon the *receipt by* the legatee, devisee, heir, next-of-kin or donee of a decedent. The Estate Tax must, therefore, be measured by the property transferred by the decedent, and takes no account of the relationship of the recipient, nor of the amount he takes; whereas it is of the essence of an Inheritance (or Succession) Tax to determine the relationship of the beneficiary and the amount which he takes.

The emphasis in a succession tax is upon the recipient, and hence the words "in possession or enjoyment" in the phrase we are now considering have a special significance. They are not there by accident; and the interpretation to be given to them must logically have reference to the nature of the tax involved. It seems to us that on theory, as well as on authority, the change of economic benefits to, and the enlargement of property rights in, the remainderman consequent upon the death of the settlor in such a case as the one at bar, must

necessarily fall within the limits of a succession tax because of the very fact that the emphasis in a succession tax is upon the enlargement of property rights in a recipient consequent upon the death of the decedent.

On the other hand, the emphasis in an estate tax is upon the transferor and upon the property which he had at the time of his death and which passes *from* him. It might properly be said that the phrase "gift intended to take effect in *possession or enjoyment* at or after death" (standing alone and without further qualification) cannot reasonably be construed to refer to the cessation of the interest of the settlor in the case of an estate tax, where the emphasis is upon the transfer *from* the settlor, and has no proper application to such a situation as exists in the case at bar. This, it seems to us, may be said to be the basis of the decisions of *May v. Heiner, supra,* and the three subsequent cases, although not so stated therein. Or again, due to the emphasis in an estate tax, it may perhaps not be construed to include what might be termed "quasi-testamentary dispositions of property" unless such dispositions are specifically defined and mentioned in the law—for example, jointly owned property with the right of survivorship, *Tyler v. United States,* 281 U. S. 497 (1930). The taxability of such dispositions, if so defined and included in the law, may be upheld as proper statutory classification in order to prevent wholesale evasion; but if not so included the law will not be construed to cover them, again because of the emphasis. Congress, in its Amendment of 1931, *supra,* did specifically include the sort of transfer now in

question, and it may be presumed that such inclusion will be upheld as to such transfers occurring after the effective date of the Amendment. But in the absence there of such inclusion, it seems to us that the decision of *May v. Heiner, supra,* and the three subsequent cases followed, upon one or the other of the two bases suggested.

We shall, therefore, proceed to show that the authorities recognize and dwell on this distinction between an estate and a succession tax: first, decisions by state courts; second, decisions by this Court; third, text writers.

(1) *The Distinction as recognized by State Courts.*

In *re Macky's Estate,* 46 Colo. 79, 102 Pac. 1075 (1909), the question was whether legacies to a Colorado city for building a hospital, and to the State University, were exempt from the Colorado inheritance tax. It was held that they were exempt. The case turned upon whether the Colorado tax was an estate tax, upon the right to transmit, in which case, no matter who the legatees or devisees were, the tax would lie, or whether it was an inheritance tax, upon the right to receive, in which case, if the legatees were agencies of the state government itself, they would be impliedly exempt, since the state does not tax itself. It was held that the latter viewpoint was correct. The court made a profound and exhaustive study of the nature of various kinds of death duties, and discussed their history, both in England, in the United States, and in the various states. Many cases are cited, quoted from, and analyzed.

The opinion is much too long to be reprinted *in extenso*. Only two short quotations from the opinion will be given:

> (102 Pac. 1077): "Here, then, are presented two classes of death duties; the one being the taxation of the interest which ceased with death, and which is upon the transmission of property. Into this class fall the probate duty and the estate duty, the burden of which is borne by the estate; the other class being the taxation of the interest to which a person has succeeded on the death, and which is upon the right to receive. Into this latter class fall the legacy and succession taxes, the burden of which is borne by the person beneficially interested, the legatee or successor in interest . . . "

> (102 Pac. 1079): "It must be borne in mind that the decisions are numerous wherein the nature of death duties are (sic) discussed generically only. Such decisions have in view the idea that the tax is not one on property, and to sustain that view treat the subject in a more general way, and hold that it is the right to dispose of or receive property by death that is the subject of taxation, without intending to be specific in the case. No decision has been pointed out to us wherein is discussed the specific nature of an inheritance or succession tax, as distinguished from that of a probate, estate, or transfer tax, but that it is held that an inheritance or succession tax is on the right to receive the property."

Re Hamlin, 226 N. Y. 407, 124 N. E. 4, 7 A. L. R. 701 (1919).

It was held that the Federal Estate Tax fell upon the residuary, and not upon the particular, legatees.

For this holding, it was necessary to analyze the nature of the Federal Estate Tax. On this point the court said (7 A. L. R. 704):

> "The validity and interpretation of the (Federal) law of 1898 was the subject of consideration by the United States Supreme Court. *Knowlton v. Moore* 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747. Mr. Justice White, writing for the court, reviewed at length the history of laws imposing death duties, impost and excise taxes, and various acts of the Congress in the enactment of revenue laws, and fully treated of the distinction between a tax imposed on the whole personal estate and a tax laid upon legacies or distributive shares, concluding that under the (Federal) law of 1898, the validity of which was sustained, the tax therein provided for was not upon the whole estate of a decedent, but was one imposed upon particular legacies or distributive shares.
>
> "In 1916, when the Congress was again confronted with the necessity of providing revenue, we may assume that the framers of a proposed law would, in the first instance, recall the law of 1898, and the decision of the United States Supreme Court in the Knowlton case, to the end that any proposed legislation should be within constitutional limitations and consonant with the decision of the court. Had the Congress of 1916 intended to impose a tax upon legacies or distributive shares, the task would be lightened by practically following the Act of 1898, as construed by the court, with any changes deemed advisable in the rate of the tax imposed. That the Congress did intend, by the law of 1916, to impose a tax on the net value of the estate of a decedent at a flat rate dependent upon the

amount of the same, rather than upon legatees or distributees, is evident by a comparison of the Act of 1916 with the Act of 1898 . . . (The court then proceeds to compare them in detail).

" . . . As bearing upon the intention of the legislature of this state in the enactment of a statute, we may consider such historical or other facts as are reasonably within the scope of judicial cognizance . . . It is also permissible in an interpretation of an act of Congress to refer to the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, under proper qualifications . . . Within the limitations of the rules prescribed, an examination of the records of the Congress discloses the following facts: The House of Representatives' Bill (No. 16,763) was referred to the committee on ways and means, of which Mr. Kitchin was chairman. On July 5, 1916, the committee on ways and means through its chairman reported the bill to the House of Representatives (Report No. 922, 64th Congress, 1st Session), and recommended that the bill do pass. The report of the Committee under the heading 'Estate Tax' reads:

'Thirty states have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other states have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal Estate tax upon the transfer of the net estate, rather than upon the shares passing to heirs and distributees or devisees and legatees. The Federal estate tax recommended forms a well-balanced system of inheritance taxation as between the Federal government and the various

states, and the same can be readily administered with less conflict than a tax based upon the shares.'

"On July 6th, when the proposed measure was under consideration in the committee of the whole, while Mr. Kitchin, the chairman of the ways and means committee, was explaining the nature of the estate tax, he was asked by a member of the House if he recalled how the proposed tax rate compared with the inheritance tax rates in the state of New York, to which inquiry Mr. Kitchin replied: 'No, I do not know. We levy an entirely different system of inheritance taxes. We levy the tax on the transfer of the flat or whole net estate. We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal government, through the Treasury Department, going into the courts contesting and construing wills and statutes of Distribution'.

"On August 16th, while the bill (H. R. 16, 763), having passed the House of Representatives, was in the Senate, the committee on finance, through Senator Simmons, made a report thereon to the Senate, in the course of which he stated:

'The report of the committee on ways and means of the House of Representatives states with such clearness, ability and sufficiency the reasons for raising this additional revenue by impositions upon incomes, inheritances, and munitions of war that your committee contents itself with incorporating in its report that part of the report of the ways and means committee dealing with this subject'.

> "Then follows, under the head of 'Estate Tax', the language already quoted from the report made by Mr. Kitchin from the committee on ways and means. Senate Report No. 793, part 1, 64th Congress, 1st Session . . .
>
> "The plain intent and obvious meaning of the act of Congress under consideration, especially when considered in connection with the facts surrounding the enactment of the same, indicate clearly that the act imposes an 'estate tax' as distinguished from an inheritance tax, that the tax is payable by the estate rather than by the legatees . . . "

Exactly the same rule was upheld in *Plunkett v. Old Colony Trust Company,* 233 Mass. 471, 124 N. E. 265, 7 A. L. R. 696 (1919, decided shortly after *Re Hamlin, supra,* and referring to it). The Massachusetts court quoted the same words of Mr. Kitchin, in his report as chairman of the ways and means committee, and refers especially to *Knowlton v. Moore,* 178 U. S. 41, 49.

The same position with regard to the Federal estate tax was taken in *Corbin v. Townshend,* 92 Conn. 501, 103 Atl. 647 (1918), where it was said (p. 505),

> "The inheritance taxes due the State of Connecticut are measured by the amount of property passing to the beneficiary, which is his share of the net estate ascertained in the manner specified in sec. 5 of the Act . . . The Federal tax under the Revenue Act approved September 8th, 1916, . . . and amended March 3rd, 1917, imposes . . . a tax 'upon the transfer of the net estate' of every decedent dying after the passage of the Act. It is an estate tax levied

on the entire estate, less a named exemption and certain designated deductions, without reference to the extent of beneficiaries. By sec. 208 the intent of the Act is expressed to be, so far as is practicable and unless otherwise directed by the will of the decedent, that 'the tax shall be paid out of the estate before its distribution'. The Federal Act of 1916 imposes a tax payable out of the estate before its distribution, thus differing from the Federal inheritance tax of 1908 *(sic)*, payable by the individual beneficiaries. It is not a tax upon specific legacies nor upon residuary legatees. It is taken from the net estate 'before the distributive shares are determined rather than off the distributive shares' . . . It is an obligation against the estate, and payable like any expense which falls under the head of administration expenses."

See also *In re Corbin's Estate,* 107 Wash. 424 (1919) 181 Pac. 910;
Commonwealth v. Carter, 126 Va. 469 (1920) 102 S. E. 58;
Commonwealth v. Patterson, 127 Va. 14 (1920) 102 S. E. 569;
People v. Bemis, 68 Colo. 48, 189 Pac. 32 (1920);
State v. First Calumet Trust & Savings Bank, 71 Ind. App. 467 (1919) 125 N. E. 200;
State v. Alston, 94 Tenn. 680, 30 S. W. 750 (1895);
Gelsthorpe v. Furnell, 26 Mont. 305, 51 Pac. 267 (1897).

(2) *The Distinction as recognized by the United States Supreme Court.*

We now turn to the Federal cases, and observe that the same distinction between an estate tax and an in-

heritance tax is perceived and followed in the Federal courts, especially in those cases in which this Court has had occasion to consider the subject profoundly. Some cases may exist in which the question was not important and in which, therefore, the distinction was slurred over; but we think it will be apparent from the cases hereafter cited that this Court perceives and acts on the distinction whenever the case raises the question. The leading Federal case on this subject has already been mentioned: *Knowlton v. Moore,* 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747 (1900). It will be remembered that that case involved the Federal death tax of 1898, the validity of which was sustained, and which was held to be an inheritance tax, not an estate tax. Mr. Justice (later Chief Justice) White, writing for a majority of the court, went at length into the history of death duties, both in this country and abroad. The opinion is most detailed, scholarly and accurate. See especially pp. 46, et seq.

Knowlton v. Moore dealt, to be sure, with the 1898 Federal death tax, whereas our primary interest is with the 1916 Federal death tax, as amended, since it is upon the 1916 tax law that certain cases were decided in this Court, which form the basis for the present attack upon the Connecticut inheritance tax law. We therefore turn to expressions of this Court in fairly recent cases having to do with the Federal estate tax of 1916, or as subsequently amended, which expressions show that the distinction between estate and inheritance taxes is just as vivid to this Court today as it was when *Knowlton v. Moore* was decided, or as it is today to various state courts.

The constitutionality of the Federal estate tax of 1916 was attacked as a whole in *New York Trust Co. v. Eisner,* 256 U. S. 345 (1921). The law as a whole was sustained. Mr. Justice Holmes, in delivering the opinion of the unanimous court, did not treat of the distinction, except incidentally, with a reference to *Knowlton v. Moore, supra.*

In *Young Men's Christian Association of Columbus v. Davis,* 264 U. S. 47 (1924), the question was whether the Federal estate tax, being paid out of the residue, must be paid by the residuary legatees, which were charitable institutions specifically exempt from the tax. It was held that it must: Mr. Chief Justice Taft said (264 U. S. 50):

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded upon death, but the interest which ceased by reason of the death."

In *Edwards v. Slocum,* 264 U. S. 61 (1924), a case dealing with the Federal excise tax, Mr. Justice Holmes said (264 U. S. 62):

> "But this is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton v. Moore,* 178 U. S. 41, 49, 77. It comes into existence before and is independent of the receipt of

> the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death'."

The case of *Saltonstall v. Saltonstall,* 276 U. S. 260 (1928) was concerned with the taxability of a certain gift under the provisions of the Massachusetts succession tax law. The tax was upheld. Mr. Justice Stone, writing the opinion for a unanimous court, said (276 U. S. 270):

> " . . . the estate tax provisions of the Federal Revenue Act of 1919 . . . tax the privilege of transmission . . . But we are here concerned, not with a tax on the privilege of transmission, not with an attempt to tax a donor's estate for an absolute gift made when no tax was thought of, . . . but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the state whether occasioned by death, *Stebbins v. Riley,* 268 U. S. 137, or effected by deed, *Keeney v. New York,* 222 U. S. 525; *Chanler v. Kelsey,* 205 U. S. 466, *Nickel v. Cole,* 256 U. S. 222. The present tax is not laid on the donor, but on the beneficiary . . . So long as the privilege of succession has not been fully exercised it may be reached by the tax . . . And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices."

In *Chase National Bank v. United States,* 278 U. S. 327 (1928), the question was whether the proceeds of certain insurance policies on the life of decedent were properly included in the net estate subject to Federal estate tax. This Court held that they were, and referred to *Saltonstall v. Saltonstall, supra,* quoting at some length from the opinion in that case. The court then said (278 U. S. 336):

> "That (the quotation from *Saltonstall v. Saltonstall),* it is true, was said of a succession tax, and we are here concerned with a transfer tax. The distinction was there important . . "

In *Ithaca Trust Co. v. United States,* 279 U. S. 151 (1929), a case which dealt with one phase of the Federal estate tax, Mr. Justice Holmes, writing for the unanimous court, said (279 U. S. 155):

> "The tax is on the act of the testator, not on the receipt of property by the legatees."

Other cases involving various phases of the Federal estate tax have been before this Court; in all of them the court has reaffirmed its position that the tax is upon the transfer from the decedent occurring at his death; but we do not cite them in this portion of the brief, since they did not find it necessary to dwell upon the distinction between an estate and a succession tax. We have found no case in which this Court ignored the distinction, where the question was fairly raised.

(3). *The Distinction as Recognized by Text Writers.*

The authors of the leading text-book, *Gleason & Otis on Inheritance Taxation,* 4th Edition (1925), have much to say about the Federal estate tax and the distinction between it and state inheritance or succession taxes. A basic distinction, such as this, results in manifold differences of treatment of minor similar phases of the two kinds of taxes. It is not thought necessary to treat here of these minor differences, so long as the main difference can be brought out.

The text book above cited says, at the very start, on page 2 et seq.:

> "In the first three editions of this work the Federal Estate Tax has been treated as part and parcel of the general scheme of inheritance taxation; but the development of the law, as construed by the United States Supreme Court and the various subordinate jurisdictions, as well as the trend of the recent amendments, have made it clear that the consideration of its provisions belongs in a class by itself. This has been more emphatically demonstrated by the enactment of the Federal Gift Tax, included in the United States Internal Revenue Act of 1924 (since repealed) . . .
>
> "All of the state taxes deal with transfers which take effect by reason of death or made in contemplation of death; but in some very essential aspects the Federal Estate Tax, even before it was supplemented, as now, by the Gift Tax, affects a man's estate before his death. As Justice Taft frankly puts it, 'Congress is in reality dealing with the testator before his death,' *Y. M. C. A. v. Davis,* 264 U. S. 47. And a testator must be alive when he makes his will!

"Even prior to the Gift Tax, the Federal Estate Tax was imposed upon gifts to take effect at or after death and gifts in contemplation of death, and any gift made within two years before death is presumed to be made in contemplation thereof, though this presumption is not conclusive.

"These provisions were copied from the state statutes, to be sure, but as Congress is dealing with the estate of a decedent and not with the beneficiary, it is providing that such an estate shall consist of sums which are no longer there, while the tax must be paid out of money actually in the hands of the executor, the adjustment of the burden of the tax being left to the State courts . . .

"With few exceptions the State inheritance tax statutes levy a duty or excise upon the beneficiary for the privilege or right of receiving property from the dead either by will or the intestate law. Even where the transfer is taxed because it was made in contemplation of death or to take effect at death, these statutes tax the beneficiary and not the estate of the decedent. On the other hand, it is the theory of the Federal Estate Tax that such transfers are to be regarded as part of the estate and the tax thereon must be paid by the executor without recourse to the beneficiary."

Professor Henry Rottschaefer, in his profound and scholarly article in 14 Minnesota Law Review (April and May, 1930), divides his discussion of the taxability of transfers intended to take effect at death, into two parts, one part dealing with the problem under state inheritance tax acts, the other part dealing with the

problem under the Federal estate tax. Coming to the latter subject, he commences by saying (page 625):

> "The Federal estate tax is levied on the transfer of the net estate of a decedent. The net estate is defined as the gross estate less specified deductions. Among the items includible in the gross estate is property to the extent of any interest therein of which the decedent has during his life made a transfer or created a trust, intended to take effect in possession or enjoyment at or after his death. The tax is generally held to be on the transfer of, rather than on the succession to, property of the decedent. It taxes not the interest to which some person succeeds on a death, but on the interest which ceases by reason of the death."

He then proceeds (page 628, et seq.):

> "The case in which a donor has transferred property, reserving an estate for his own life, is one that has been frequently passed on. The decisions under state inheritance tax statutes are unanimous that this is a transfer intended to take effect in possession or enjoyment at the donor's death. If, then, this language in the federal estate tax act describes the same fact situations described by the same expression in the state statutes, then would the property thus disposed of have to be treated as part of the donor's gross estate. It has been held a part thereof in most cases. It was so held in one case on the theory that this was in substance such a post-mortem disposition of the property as the statute was intended to tax. The decision in another case was based on the reasoning that the donor, by reserving the income for his life, retained an interest in the property until his death, that it was ony then that the transaction was fully completed, and that the beneficiaries acquired

no benefits until that time. The fact that the interest of the remainderman was technically vested prior to the donor's death is immaterial since the tax question does not depend for its answer on such considerations. There have, however, been contrary decisions. One of these rested on the theory that the donor had by the transfer completely divested himself of the title to the property, and that, therefore, the fact that the beneficiaries were postponed until his death, as far as the actual enjoyment of the property was concerned, was immaterial. Another adopts the position that property can be held to have been disposed of by a transfer intended, etc., so as to be includible in the gross estate, only if the transfer remains incomplete up to the time of the donor's death. It purports to derive this test from *Nichols v. Coolidge, Reinecke v. Northern Trust Co.,* and *Chase National Bank v. United States.* The importance attached by the last two of these cases to the shifting of economic interests is rather an argument against than for such views. It is undeniable that a donor who transfers property with a reservation of a life estate or right to the income for his own life retains the most important economic interest therein until his death, and that that interest is furthermore either a legal or equitable estate in the property. If the purpose is to include in the gross estate the property interests retained by the decedent until his death, and the property whose economic benefits he enjoyed until that time, there is every reason for including property disposed of during his life by a transfer under which he reserved a life interest in the thing transferred. It is of course true that, in a technical sense, his interest does not pass at his death, but his death is the event on whose occurrence like benefits shift to the remainderman. The cases first discussed should, therefore, be

considered as correctly stating the law on this matter . . . "

It must be remembered that Professor Rottschaefer wrote this article before the decisions in *May v. Heiner* and the later cases were handed down by this Court; but we do not believe that the validity of his conclusions with respect to the scope of the Federal estate tax is thereby impaired. We are not, to be sure, primarily interested in the exact scope of the Federal estate tax, and even if his conclusions with respect to that tax are unsound, we do not for a moment concede that that would affect the scope of a succession tax. However, since the subjects are sufficiently interrelated so that we are obliged to deal with both sorts of taxes, we have, in another part of this brief, attempted to show that *May v. Heiner* and the later cases in this Court do not in any way conflict with the "shifting of economic interests" theory upon which both this Court and Professor Rottschaefer largely rest. In *May v. Heiner,* settlor retained no important economic interests, and the later cases *(Morsman v. Commissioner, McCormick v. Commissioner,* and *Commissioner v. Northern Trust Co., supra)* went off on the technical ground of what Congress intended, and not on the substantial question. The intention of Congress was made plain within two days thereafter, by an amendment to the Federal law; and there the matter rests at present.

See, also, *Cooley on Taxation,* Fourth Edition, Vol. 4, Sec. 1722.

IV.

RECENT STATE DECISIONS.

Since the decision of *May v. Heiner, supra,* the highest courts of Massachusetts, New York, Minnesota, Ohio, Wisconsin and Washington have rendered decisions in conformity with that of the court below in the case at bar. This is enough to show that state courts, in deciding this question with respect to state succession taxes, do not consider that the constitutionality of death taxation of "gifts intended" has been adversely decided by this Court.

The Massachusetts case is *Worcester County National Bank v. Commissioner of Corporations and Taxation* (decided April 10, 1931), 275 Mass. 216, 175 N. E. 726. It is to be especially noted that this Massachusetts decision was made after and with special reference to *May v. Heiner* and the three subsequent decisions. In this case, the settlor created a trust in 1919 (after the passage of the taxing statute which contained the phrase "gifts intended" etc.), which trust was irrevocable, and wherein the settlor reserved to himself the life use, with remainder over after his death to his prospective wife. Settlor died in 1927. The Court said (175 N. E. 728):

> "*First.* The property held by the petitioner under the trust indenture passed 'by deed, grant or gift—made or intended to take effect in possession or enjoyment after . . . (the) death' of the decedent, within the meaning of the statute.

"The transaction was within the description of the statute. The property passed from the decedent to the beneficiary 'by deed, grant or gift'. Though upon the creation of the trust an equitable remainder in the trust fund, after the life estate of the decedent in such fund, vested in interest in the beneficiary, she was not entitled to 'possession or enjoyment' of the fund or any part of it until the death of the decedent. The 'deed, grant or gift' was 'intended to take effect in possession or enjoyment after his death'. Her present right to the future 'possession or enjoyment' of the trust fund, which was 'vested' in the sense of being assignable and transmissible by her during the life of the decedent (see *Nickerson v. Harding,* 267 Mass. 203, 207), was not 'possession or enjoyment', within the meaning of the statute. The statute recognizes the familiar distinction between taking effect in possession or enjoyment and vesting in right, title or interest. *State Street Trust Co. v. Treasurer and Receiver General,* 209 Mass. 373, 378. *Pratt v. Dean,* 246 Mass. 300, 307-308. *Saltonstall v. Treasurer and Receiver General,* 256 Mass. 519, 523-525; s.c. 276 U. S. 260, 269-270. See also *Magee v. Commissioner of Corporations and Taxation,* 268 Mass. 443, 450-451; *United States v. Fidelity Trust Co.,* 222 U. S. 158, 168. Apparently the Legislature intended to reach for the purpose of taxation the shifting of the enjoyment of property—the 'economic benefits' thereof or 'economic interest' therein (compare *Saltonstall v. Saltonstall,* 276 U. S. 260, 271; *Reinecke v. Northern Trust Co.,* 278 U. S. 339-346)—from a former owner at his death, even though such shifting of enjoyment followed necessarily from a prior transfer of title inter vivos. As was said in *State Street Trust Co. v. Treasurer and Receiver General,* 209 Mass. 373, 379, 'The policy of the law is, that the owner of

property shall not defeat or evade the tax by any from of conveyance or transfer, where after death the income, profit or enjoyment enures to the benefit of those who are not exempted'. The decision in *Dexter v. Treasurer and Receiver General,* 243 Mass. 523, is not in conflict with this interpretation of the statute for as a result of the transfer considered in that case enjoyment of the property in question shifted before the death of the former owner. 'The possession and enjoyment vested in the beneficiaries when the trust deed was delivered to the trustees'. (Page 527). See also *Shukert v. Allen,* 273 U. S. 545; *Reinecke v. Northern Trust Co.,* 278 U. S. 339. The cases of *May v. Heiner,* 281 U. S. 538, and *McCaughn v. Carnill,* 43 Fed. Rep. (2nd) 69, relied on by the petitioner, deal with the construction of Federal statutes imposing estate taxes and are distinguishable because of the terms of those statutes, if not on other grounds. See *Milliken v. United States,* United States Supreme Court, decided March 2, 1931. (Page 2.) *Coolidge v. Long,* United States Supreme Court, decided February 24, 1931, is distinguishable in its facts."

The New York case is *Matter of Barstow,* 253 N. Y. 123, 177 N. E. 177, (May 22, 1931).

Testatrix during her lifetime executed a trust agreement whereby she reserved to herself, during her life, the income arising therefrom, and directed, upon her death, that one-half of the income be paid to each of her two daughters. Upon the death of either daughter the income of the entire fund was to go to the survivor for life, and upon the death of both the principal was to be paid to remaindermen. The only question was

whether the transfer should be taxed under the law in effect at the date of the death of the donor or at the date of the execution of the instrument. The Appellate Division held that the latter was the proper basis. This was affirmed without opinion by the Court of Appeals.

This, too, is a square decision in our favor, to the effect that a state may levy an inheritance or succession tax with respect to the transfer of property under an irrevocable trust wherein the settlor reserved a life use to himself, with remainders over after his death. It is to be noted that this case was decided after *May v. Heiner* and after *Morsman v. Commissioner, McCormick v. Commissioner,* and *Commissioner v. Northern Trust Co., supra,* and presumably with reference to them, although they were not mentioned, since the New York Court of Appeals affirmed without opinion.

The other decisions mentioned above are:

1. *Rising v. State,* 242 N. W. 459 (Minn. Apr. 22, 1932).
2. *Sherman v. Tax Commission of Ohio,* 181 N. E. 539 (Ohio, June 1, 1932).
3. *Ogden v. Milwaukee,* (Prentice Hall Inheritance Tax Service 1932, Wisconsin Section, Par. 1117, Supreme Court of Wisconsin, October 11, 1932).
4. *Re Estate of Addie M. Hall Ellis, State of Washington v. Edith Moore Suzzalo, et al, executors,* 14 Pac. (2nd) 37 (Washington, September 20, 1932).

No more comment is required, except to point out two sentences from the majority opinion in *Coolidge v. Long,* 282 U. S. 582, which sentences, if not *obiter,* we respectfully submit are decisive of the questions now before this Court. Mr. Justice Butler, writing for the majority of this Court said (282 U. S. 596):

> "In its opinion, the state court (i.e., the Supreme Court of Massachusetts, in deciding *Coolidge v. Long* below) suggests that the Federal Estate Tax was upon property of the deceased transferred at his death and that it was levied upon a subject quite different from the succession to property by a beneficiary which is the subject of the present excise. *Undoubtedly the state has power to lay such an excise upon property so passing after the taking effect of the taxing act.*" (Italics Ours)

V.

APPELLANT'S CLAIMS OF UNCONSTITUTIONALITY.

1. In General.

In what we have said, we have attempted to show that reason and authority unite in upholding the rule that an irrevocable trust, reserving the life use to settlor, is properly subject to succession tax, so long as no retroactive effect is given to the statute. Because the question has been so much litigated and discussed, it would seem as if every possible constitutional objection to the imposition of such tax must already have been brought forward and repelled. But such an assumption is only by way of implication; and since the appellant in the case at bar raises and urges certain constitutional claims, we deem it necessary to meet them squarely.

These claims are based, respectively, upon the due process clause, the equal protection clause and the impairment of contract clause.

2. Due Process.

The claim is made that Connecticut cannot, consistently with the due process clause, levy a death tax on a transfer such as this, under the guise of including it as a "gift intended", because the interests vested absolutely in the donee or transferee long before the death of the donor. The scope of the due process clause is broad, but as we understand it, it requires (a) that the taxpayer be given opportunity to appear and be

heard before some adequate tribunal concerning the proposed imposition of the tax. That certainly is the case here. (b) That no retroactive effect is given to the tax. But here the statute was in effect before the transfer was executed, so that no claim can be made on this ground. (c) That the subject of the tax (what the Massachusetts Supreme Court calls the "commodity" taxed) was within the jurisdiction of the State. Here the subject of the transfer was all intangible personalty (R. 10-20), and it is well settled (*Blodgett v. Silberman*, 277 U. S. 1) that that has its situs, for death tax purposes, at the domicile of the owner. The owner (the settlor) was domiciled in Connecticut (R. 3). And it is too well settled to require the citation of authority that, in general, a state may levy a death tax with respect to the intangible personalty of persons who die domiciled therein.

Appellant's claim under this head, therefore, comes down to this: that granting all the above, this transfer was of a peculiar sort which could not be reached by a death tax (by whatever name it might be called), because here nothing passed from the decedent at death upon which a death tax could be based. This is the estate tax argument. No decisions of this Court support it, and, as we have attempted to show, its vice consists in concentrating upon the technical aspects of title and in ignoring the fact that possession and enjoyment of the fund did change at the settlor's death, that new and larger interests in the property (especially as to the income, as the chief economic benefit thereof) were acquired by the remaindermen at, and not before, the settlor's death.

Mr. Justice Roberts said, in the dissenting opinion in *Coolidge v. Long, supra,* 282 U. S. 582, at page 624:

> "Notwithstanding the distinction between a transfer (estate) tax and a succession tax, the decisions under the federal estate tax statutes . . . are convincing on the matter of substantiality as against technicality. The court has uniformly disregarded the technical aspect of a transfer and looked at the reality and substance of a transaction".

In *Keeney v. New York, supra,* 222 U. S. 535 (1912) it was argued, as to the due process clause, that such a statute was radically different from a true inheritance tax, and was in reality a tax on property. This argument was repelled, the Court saying (p. 533):

> "There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed to take effect at death have frequently been classed with death duties, legacy and inheritance taxes . . . An excise on transfers, therefore, does not lose that character because the amount to be paid is determined by the values conveyed".

In *Moffitt v. Kelly,* 218 U. S. 400 (1910), the facts were these: Moffitt married in California in 1863 and resided there with his wife until his death in 1906. By his will he gave his estate to his wife and children as if he had died intestate. The probate court held that

his widow's interest in the marital community was within the provisions of a California law, passed in 1905, taxing all devolutions of property by will or intestacy. The question was, therefore, whether a surviving wife was liable for a tax, which, as applied, could only be incident to her coming into untrammeled possession and enjoyment of what she had technically owned prior to the passage of the taxing statute. The supreme court of California held the tax valid against her insistence that this was a violation of the contract clause, the due process clause and the equal protection clause of the Federal Constitution. This Court unanimously sustained the judgment and, by Mr. Justice White, said (p. 403):

> "But in every conceivable aspect the proposition must rest upon one or both of two theories, either that the nature and character of the right or interest was such that the State could not tax it without violating the Constitution of the United States, or that if it could be generically taxed without violating that instrument, for some particular reason the otherwise valid state power of taxation could not be exerted without violating the Constitution of the United States. The first conception is at once disposed of by saying that it is elementary that the Constitution of the United States does not, generally speaking, control the power of the states to select and classify subjects of taxation, and hence, even although the wife's right in the community property was a vested right which could not be impaired by subsequent legislation, it was, nevertheless, within the power of the State, without violating the Constitution of the United States, in selecting objects of taxation, to select the vesting in complete pos-

session and enjoyment by wives of their share in community property consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof. And this also disposes of the second conception, since if the State had the power, so far as the Constitution of the United States was concerned, to select the vesting of such right to possession and enjoyment as a subject of taxation, clearly the mere fact that the wife had a pre-existing right to the property created no exemption from taxation if the selection for taxation would be otherwise legal. It follows, therefore, that the mere statement of the contention demonstrates the mistaken conception upon which, in the nature of things, it rests.

"It is said, however, that the reasoning just stated, while it may be abstractly sound, is here inapplicable, because the thing complained of in this case is that the State of California has imposed an inheritance tax upon the share of the wife in the community and thereby taxed her as an heir of her husband, when if the laws existing at the time of the celebration of the marriage be properly construed and be held to be contractual she took her share of the property on her husband's death, not as an heir to property of which he was the owner, but by virtue of a right of ownership vested in her prior to the death of the husband, although the right to possess and enjoy such property was deferred and arose only on his death. But for the purpose of enforcing the Constitution of the United States, we are not concerned with the mere designation affixed to the tax which the court below upheld, or whether the thing or subject taxed may or may not have been mistakenly brought within the state taxing law. We say so because in de-

> termining whether the imposition of the tax complained of violated the Constitution of the United States, we are solely confined to considering whether the state had the lawful power, without violating the Constitution of the United States, to levy a tax upon the subject or thing taxed. This being true, as it clearly results from what we have said that the vesting of the wife's possession and enjoyment arising upon the death of her husband was subject to be taxed by the State, so far as the Constitution of the United States was concerned, it follows that whether the tax imposed was designated or levied as an inheritance tax or any other is a matter with which we have no concern".

Commenting upon this decision, Mr. Justice Roberts, speaking for the minority of the court in *Coolidge v. Long, supra,* says (282 U. S. 622):

> "Whatever may be said of the nature of the wife's interest in community property, this decision assumes the wife's vested interest in her half thereof; and that its free and unencumbered enjoyment only was postponed to the husband's death. There can be no difference in legal effect between that situation and one presented by the division of the total interest in a given property into a life tenancy and a remainder."

While Mr. Justice Roberts cited and commented upon *Moffitt v. Kelly* in support of the proposition that an inheritance tax could be levied upon a transfer in trust wherein the life use was reserved to the settlor, if the latter died after the passage of the taxing statute though the trust was irrevocably executed before such passage—a proposition which was disapproved of by the majority of the court and the matter decided other-

wise—yet it seems to us that, *mutatis mutandis,* the remarks of this court in *Moffitt v. Kelly,* and Mr. Justice Roberts' comments thereon, are applicable to the case at bar, and show that the Constitution of the United States does not prohibit Connecticut from selecting as a subject of taxation the "vesting in complete possession and enjoyment" of a remainderman's interest in an irrevocable trust upon the death of the settlor, provided no retroactive effect is attempted to be given to the taxing law; and, further, that it is no concern of this Court what the state tax is called.

3. Equal Protection.

As to the equal protection clause, appellant's claim is that this transfer was a gift *inter vivos* and that to levy a tax on it (under the pretense of a death tax) while omitting to tax other sorts of *inter vivos* gifts, is unfair discrimination or classification. But Connecticut, like all other jurisdictions, does tax gifts in contemplation of death, which are truly *inter vivos* gifts; and these two sorts of gifts are properly singled out for special treatment since they sufficiently resemble devolutions by will or by intestacy, *Milliken v. United States, supra,* 283 U. S. 15 (1931). The words of this Court in *Moffitt v. Kelly, supra,* 218 U. S. 400 (1910) are likewise applicable here.

In *Keeney v. New York,* supra, 222 U. S. 525 (1912), it was argued, as to the equal protection clause, that the tax was arbitrary and discriminatory (a) because it was an unreasonable classification, since no othe taxes were levied on *inter vivos* gifts, and (b) be-

cause it was assessed at gaduated rates. Both of these arguments were likewise repelled, the court saying, as to (a): (p. 535)

> "The validity of the tax must be determined by the laws of New York. The 14th Amendment does not diminish the taxing power of the State, but only requires that, in its exercise, the citizen must be afforded an opportunity to be heard on all questions of liability and value, and shall not, by arbitary and discriminatory provisions, be denied equal protection. But it does not follow that because it can tax any transfer . . . that it must tax all transfers, or that all must be treated alike . . .
>
> "There can be no arbitrary and unreasonable discrimination. But when there is a difference, it need not be great or conspicuous in order to warrant classification. In the present instance, and so far as the 14th Amendment is concerned, the state could put the transfers intended to take effect at the death of the grantor in a class with transfers by descent, will, or gifts in contemplation of the death of the donor, without, at the same time, taxing transfers intended to take effect on the death of some person other than the grantor, or on the happening of a certain or contingent event."

And moreover to call this transfer a gift *inter vivos,* as the appellant does, is to assume the point in question; it is to assume that the gift was wholly completed, in all of its aspects before settlor's death, whereas our chief contention is that it was not completed, so far as possession and enjoyment of the income in the remaindermen was concerned, until at or after her death.

In *Milliken v. United States, supra,* 283 U. S. 15 (1931), the 1916 Federal Estate Tax law taxed gifts in contemplation of death. In that year decedent, in contemplation of death, made an outright gift of stock to his children. The donor died after the enactment of the 1928 Act, which also taxed gifts in contemplation of death, but at higher rates, whether or not the gift was made before or after the enactment of the law. The gift was taxed at the 1928 rates, on the value at the date of death. This Court sustained the assessment unanimously. The chief claim of the taxpayer, as stated by this Court, was lack of due process (283 U. S. 20).

> "It is said that the statute is invalid not alone because it reaches a gift made before its enactment, but because it measures the tax by rates not in force when the gift was made, applied to the value of the property not when given, but at the uncertain later time of the death of the owner."

This Court dismissed this argument saying in part (283 U. S. 23):

> "Not only was the decedent left in no uncertainty that the gift he was then making was subject to the provisions of the existing statute, but in view of its well-understood purpose, he should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation under which substitutes for testamentary gifts were classed and taxed with them."

> "Further, as an appropriate and indeed necessary measure to secure the effective administration of a system of death taxes, we think the present tax is to be supported as an incident and

in aid of the exercise of the constitutional power to levy a tax on the transfer of the decedent's estate at death."

Tyler v. United States, 281 U. S. 497 (1930).

The Federal Estate Tax in terms includes in the gross estate property "to the extent of the interest therein held jointly or as tenants by the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other persons and never to have belonged to the decedent."

The sole question involved was the constitutionality of the tax.

This Court held that the tax was valid, saying (p. 503):

> "The question here, then, is not whether there has been in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty, or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.
>
> "The attack upon the taxing act as constituting a violation of the Fifth Amendment is wholly without merit. The point made is that the tax is so arbitrary and capricious as to amount to confiscation, and, therefore, to result in a depriva-

tion of property without due process of law. The tax, as we have just held, falls within the power of taxation granted to Congress, and the challenge becomes one not to the power, but to an abuse of it. The possibility that a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment must be conceded—*Brushaber v. Union Pacific R. R.*, 240 U. S. 1, 24 and cases cited, *Nichols v. Coolidge*, 274 U. S. 531, 542—but the present statute is not of that character. To include in the gross estate, for the purpose of measuring the tax, the value of property, no part of which originally belonged to one spouse, but which came to the tenancy, mediately or immediately, as a pure gift from the other, and which, as a consequence of the latter's death, was relieved from restrictions imposed by the law in respect of tenancy by the entirety so as to produce in the survivor the right of sole proprietorship, is obviously neither arbitrary nor capricious. The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end."

In *Klein v. United States*, 283 U. S. 231 (1931), it was said in another connection—but the words are applicable here:

(page 234) " . . . It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its

transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed."

4. Impairment of Contract.

Under the impairment of contract clause, a claim is made by appellant which is difficult to summarize, since it is based on two erroneous assumptions. It seems to be (a) that the tax was not sustainable under the 1923 act; (b) that since the court below upheld the tax it must have relied upon some other act; (c) that the only applicable act was the 1929 act; (d) but that that act could not be applied to the present transfer since to do so would involve unconstitutional retroactivity, although the act could be applied prospectively. But the Tax Commissioner, appellee herein, has never made, either to the court below or to this Court, any claim that the 1929 act governed the situation. Our whole brief has been directed to showing that the 1923 act applies. We are content to stand or fall upon that. It is respectfully submitted that appellant is erroneous in claiming that the 1923 act cannot apply and in claiming that the court below applied some other act. There can be no question, in view of the opinion of the court below and of the questions which were asked and answered, which act it relied on. It was aware of the 1929 act, but mentioned it only once, near the beginning of its opinion (R. 26), and the purpose of that one mention was merely historical, to show that the phrase "gift intended" remained constantly in the Connecticut succession tax laws from 1915 to date.

And in fact the 1929 act cannot now be drawn in question. It clearly appears from the Record that the 1923 act was the only one considered or applied by the court below. See the Certificate of the Chief Justice of the Connecticut Supreme Court of Errors (R. 45, 46); Appellant's Assignments of Error (R. 44, 45); Appellant's Petition for Leave to Appeal (R. 43); The Judgment appealed from (R. 39); and the opinion of the court below (R. 36, 37). In the face of this, it is now too late for appellant to seek to drag in another statute or to claim that such other statute was "really" applied if such were the case, which it is not. But we do not propose to argue this further.

VI.

CONCLUSION

We have attempted to show

(1) That the power of a state prospectively to levy a succession tax upon such a transfer has been unanimously upheld by state courts. This involves, likewise, the holding that the legisature intended to tax such a transfer, by the words used.

(2) That this ruling has been approved, if not squarely affirmed, by this Court *(Nickel v. Cole, supra, Keeney v. New York, supra).*

(3). That reason, as well as authority, upholds such a tax as a just and necessary classification.

(4). That whatever may be said about an estate tax *(May v. Heiner, supra,* and the three later companion cases), such decisions do not affect the construction or scope of a succession tax in this regard.

(5). That there is nothing unconstitutional about the imposition of such a succession tax, either because of the due process clause, the equal protection clause, or the contract clause.

Wherefore, it is respectfully submitted that the decision below should be affirmed.

Respectfully submitted,

WILLIAM H. BLODGETT, *Tax Commissioner,*

By ERNEST L. AVERILL,
Deputy Attorney-General,

FARWELL KNAPP,
Assistant Tax Commissioner,
His Attorneys.

APPENDIX

CONNECTICUT PUBLIC ACTS, 1929, CHAPTER 299.

Section 1. Tax on transfers of property. A tax is imposed, under the conditions and subject to the exemptions and limitations hereinafter prescribed, upon transfers, in trust or otherwise, of the following property or any interest therein or income therefrom: (a) When the transfer is from a resident of this state; (1) real property situated in this state; (2) tangible personal property, except such as has an actual situs without this state; (3) all intangible personal property; (b) when the transfer is from a nonresident of this state; (1) real property situated in this state; (2) tangible personal property which has an actual situs in this state.

Section 2. Transfers taxable. The transfers enumerated in section one of this act shall be taxable if made: (a) by will; (b) by statutes relating to descent and distribution of property upon the death of the owner; (c) in contemplation of the death of the transferor, and any transfer of property between parties related by blood or marriage, either by a direct conveyance or by conveyances through a third party, made and completed within one year next prior to the date of death of the grantor or donor, shall, unless shown to the contrary, be construed prima facie to have been made in contemplation of death; (d) by gift or grant intended to take effect in possession or enjoyment at or after the death of the transferor. A transfer of property in respect of which the transferor reserves to himself a

life income or interest shall be construed prima facie to have been intended to take effect in possession or enjoyment at death; (e) in payment of a claim against the estate of a deceased person arising from a contract made by him and payable by its terms at or after his death, but a claim created by an ante-nuptial agreement made payable by will shall be considered as creating a debt against the estate and shall not constitute a taxable transfer; (f) if any transfer, specified in paragraphs (c), (d) and (e) of this section should be made for a valuable consideration, so much thereof as is the equivalent in money value of the money value of the consideration received by the transferor shall not be taxable, but the remaining portion shall be taxable. If it shall become necessary or appropriate in ascertaining such value to use mortality tables, the American Men's Ultimate Mortality Tables at four per centum compound interest, shall be used, so far as applicable. The provisions of this section shall not apply to any policy of life or accident insurance.